82-1538

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HILLSDALE COLLEGE,
Petitioner,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT W. BARKER
Counsel of Record
GORDON C. COFFMAN
LUISA L. LANCETTI
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether students in need of certain federal student loans and grants may lawfully be deprived of such loans and grants by termination order of the Department of Education, solely because their private, independent college, in order to remain free from governmental intervention in its affairs, refuses federal assistance and therefore refuses to execute an Assurance wherein it certifies its coverage under and compliance with regulations promulgated under Title IX of the Education Amendments of 1972.*

2. Where a college receives no federal assistance and does not discriminate, may all of the college's educational activities and programs be made subject to regulations promulgated by the Department under Title IX merely because it enrolls students who participate in certain federal student loan and grant programs.

These same issues and others, also present in the instant case, will be argued before the Court in *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3598 (U.S. Feb. 22, 1983) (No. 82-792).**

---

* 20 U.S.C. §§ 1681-1686 (1976) ("Title IX").

** In the administrative proceedings below, Hillsdale College argued that, in the alternative, Title IX and its implementing regulations were unconstitutional, if the Department's position were upheld. (*See* Brief of Hillsdale College, Administrative Compliance Proceeding, filed May 15, 1978, at 37-50.) Hillsdale believes that the Court should not have to reach the Constitutional challenge raised in order to properly resolve this controversy. However, Hillsdale is aware that the Questions Presented by Grove City College in its petition for writ of certiorari to the Third Circuit Court of Appeals, filed November 9, 1982, includes a First Amendment Constitutional question (*i.e.*, "Does the application of Title IX regulation to the College and its students violate First Amendment rights to academic freedom and association?"). Thus, as it did before the

PARTIES

Petitioner: Hillsdale College, Hillsdale Michigan.

Respondents: Department of Education; the Secretary of the Department; the United States of America.***

Sixth Circuit Court of Appeals (*see* Brief of Hillsdale College, filed September 22, 1980, at 2 n.3), Hillsdale preserves its Constitutional challenge, and if this petition is granted reserves the right to argue this claim before the Court, if necessary.

*** The court below identified respondents, in the caption of its decision, as the "Department of Health, Education & Welfare, *et al.*" ("HEW"). (Appendix ("App.") at 1a.) While the suit was originally brought by this agency (App. at 55a), it no longer exists, and all of HEW's functions relating to the interpretation and enforcement of Title IX have been transferred to the Department of Education. *See* Pub. L. No. 96-88 (October 17, 1979), 93 Stat. 677-78. For this reason, in July 1980, Hillsdale filed with the Sixth Circuit Court of Appeals a motion to substitute the Department of Education and its Secretary, for HEW and its Secretary. We have been advised that the court did grant this motion. For the sake of clarity, since HEW no longer exists, we have taken the liberty of correcting the caption herein in conformance with the substitution granted by the court below. In this petition we will refer to both HEW and its successor, the Department of Education, as "the Department."

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

HILLSDALE COLLEGE,
Petitioner,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Hillsdale College respectfully requests that the Court grant its petition for writ of certiorari, seeking review of the Sixth Circuit Court of Appeals' decision in this case, and further requests that this case be consolidated for consideration with *Grove City College v. Bell.*[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 696 F.2d 418 (6th Cir. 1982) and appears in the Appendix herein. (App. at 1a.)

---

[1] As mentioned, the Court recently granted Grove City College's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3598 (U.S. Feb. 22, 1983) (No. 82-792) ("*Grove City College*").

The decision of the HEW Reviewing Authority, Civil Rights, and the Initial Decision by the Administrative Law Judge in this proceeding are not reported but also appear in the Appendix. (App. at 43a, 55a.)

JURISDICTION

The decision of which review is now sought was dated and entered on December 16, 1982. (App. at 42a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

The following statutory provisions and regulations are involved in this petition. They are reproduced in the Appendix:

1. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976) (App. at 80a).
2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 (1976) (App. at 84a).
3. The regulations of the Department of Education, 34 C.F.R. Part 106 (1982)[2] (App. at 86a).

STATEMENT OF THE CASE

This case concerns the scope of Title IX of the Education Amendments of 1972 ("Title IX"), and the proper ambit of the Department of Education's regulatory authority under this statute. At issue in this case is the propriety of the Department's attempted exercise of regulatory control over the operations of Hillsdale College, a private and independent college which refuses federal

[2] When this lawsuit was initiated, these regulations were administered by HEW and were codified at 45 C.F.R. Part 86. They were recodified at 34 C.F.R. Part 106 in substantially identical form on May 9, 1980, in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802, 30962-3 (1980).

assistance because of its desire to foster and maintain academic independence and autonomy.[3]

Title IX prohibits sex discrimination in education programs or activities which receive federal assistance.[4] There is no allegation or showing of sex or other discrimination at Hillsdale. Pursuant to Title IX's implementing regulations,[5] the Department has designated Hillsdale College a "recipient" of "federal financial assistance,"[6] and for this reason has sought to exercise

---

[3] Hillsdale College was founded in 1844 and is a private, nonsectarian, coeducational college located in Hillsdale, Michigan. Its present enrollment is approximately 1,000 students. Hillsdale was one of the first colleges in the United States to admit women equally with men. Half of its enrolled students are women.

[4] 20 U.S.C. § 1681.

[5] Under the statute, the Department is authorized to issue implementing regulations, and to enforce such regulations by administrative enforcement proceedings. The ultimate sanction for noncompliance with the statute is the termination of federal assistance to "the particular program, or part thereof . . .," in which noncompliance is found. 20 U.S.C. § 1682. This limited termination provision has been termed the "program-specificity" requirement. The program-specific aspect of the Title IX legislation has been held by this Court to impact both upon the Department's authority to "promulgate regulations and to terminate funds." *North Haven Board of Education v. Bell*, 456 U.S. 512, 534-38 (1982) (*"North Haven"*). *See* discussion *infra*, at 11-12.

[6] As noted above, under Title IX, sexual discrimination is prohibited in educational programs or activities which receive federal assistance (20 U.S.C. § 1681). Under the Department's implementing regulations, however, the terms "receives or benefits" are deemed equivalent in meaning—a result that cannot be countenanced under the statute. A review of the pertinent regulations illustrates the problem. 34 C.F.R. § 106.11 (App. at 98a) provides:

> Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance. (Emphasis added.)

Moreover, under Sections 106.2(g)(1)(ii) (App. at 89a) and (h) (App. at 90a), "recipient" and "Federal financial assistance" are

regulatory control over all of the operations of the College.[7]

The sole basis for the Department's efforts to secure an executed Assurance and its concomitant attempt to assert regulatory control over the College is that certain students attending Hillsdale participate in four federal loan and grant programs.[8] Hillsdale College itself does

---

defined in the following fashion so as to implicate Hillsdale, in contravention to the plain language of Title IX.

Section 106.2(h) defines "Recipient" to include:

> [A]ny public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives *or benefits* from such assistance . . . . (Emphasis added.)

Section 106.2(g)(1)(ii) defines "Federal financial assistance" to include:

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

[7] *See Hillsdale College v. HEW*, 696 F.2d 418, 424-25 (6th Cir. 1982) (*"Hillsdale College"*). (App. at 13a.)

[8] The particular programs at issue are the National Direct Student Loan Program ("NDSL") (20 U.S.C. §§ 1087aa *et seq.*), the Supplemental Educational Opportunity Grant Program ("SEOG") (20 U.S.C. § 1070b), the Basic Educational Opportunity Grant Program ("BEOG") (20 U.S.C. § 1070a), and the Guaranteed Student Loan Program ("GSL") (20 U.S.C. §§ 1071 *et seq.*). In the NDSL and SEOG programs, the College voluntarily functions in an administrative capacity, by disbursing educational funds provided by the federal government to student applicants solely on the basis of independently predetermined eligibility criteria, which consider need. Under the BEOG and GSL programs, the College's only function is ministerial—as it certifies student enrollment and educational costs. With respect to the GSL program, Hillsdale has always maintained that it comes within Title IX's exemption for contracts of insurance or guaranty (20 U.S.C. § 1682), but the Department has disagreed. It is our understanding that the Department has reversed its opinion regarding GSL participation in the *Grove City College* case. Thus, we assume that the question of the presence of the GSL Program within Title IX is not at issue here.

not receive federal assistance in any of the specified student loan and grant programs. Moreover, the College does not operate any other educational program or activity which receives federal assistance.[9] It must be stressed that Hillsdale is not seeking the right to discriminate, nor does it in fact discriminate.[10] Instead, the College's decision to forego federal assistance is entirely a matter of academic principle and policy of independence from federal governmental control. In fact, Hillsdale does not question the propriety of the statute's nondiscrimination requirements. The record in this case shows no allegation or finding of discrimination.[11] Moreover, the College has historically followed a consistent and independent policy of non-discrimination. Hillsdale College admitted both blacks and women to the College *before* the Civil War. Indeed, the first woman in Michigan to graduate with a Bachelor of Arts Degree (she was the second woman in the United States to do so) received her degree from Hillsdale in 1852.

Specifically, throughout this proceeding, the Department has sought the College's submission of an Assurance of Compliance with the Title IX regulations.[12] This document requires a signatory to confirm that each education program or activity operated by the applicant/institution to which the regulations apply will be conducted in compliance with Title IX and the regulations.[13]

---

[9] *Hillsdale College*, 696 F.2d at 420. (App. at 3a.)

[10] *See supra*, n.3. *See also Hillsdale College*, 696 F.2d at 419. (App. at 2a.)

[11] *Hillsdale College*, 696 F.2d at 419. (App. at 2a.) ("[N]o allegations of actual sexual discrimination on the part of the college have been made or are before this court.")

[12] *Id.* at 421. (App. at 6a.) The document the College was asked to submit was HEW Form 639A. It is reproduced in the Appendix at 125a.

[13] *Id.* The basis for the Department's requirement is found in 34 C.F.R. § 106.4 (1982) (App. at 93a), which provides:

> (a) General. Every application for Federal financial assistance for any education program or activity shall as a condition of its

Hillsdale has refused to execute the Assurance because it challenges the applicability of the statute to any of its operations and questions the Department's theory of regulatory coverage.[14]

Pursuant to its regulations, in 1977 the Department sought Hillsdale's voluntary compliance with the Assurance of Compliance requirement. Hillsdale repeatedly refused to submit an executed Form 639A, arguing that the regulations improperly deemed Hillsdale a "recipient" of federal assistance under Title IX, and subjected all of the College's operations to governmental regulation.

After failing in efforts to secure Hillsdale's voluntary compliance with the Assurance requirement,[15] in December 1977, the Department commenced an administrative compliance proceeding against Hillsdale, requesting an order terminating and refusing to grant or continue federal financial assistance to Hillsdale's students solely because of the College's refusal to execute the Assurance.

On August 23, 1978, the Administrative Law Judge ("ALJ") issued his Initial Decision[16] wherein he found the College to be a "recipient" of federal financial assistance under the specified loan and grant statutes. However, the ALJ denied the Department's request for an order terminating federal financial assistance to Hillsdale's students. The Judge's ruling in this regard was based upon reliance on a series of federal cases which had held that the regulations pertaining to the prohibi-

---

approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

[14] *Hillsdale College*, 696 F.2d at 424. (App. at 11-12a.)

[15] *Id.* at 421-22. (App. at 6a.)

[16] App. at 55a.

tion of sex discrimination in employment practices were invalid.[17] The ALJ held that it would be arbitrary and capricious to require the College to assure compliance with regulations that had been declared invalid.

In October 1979, the Reviewing Authority, Civil Rights, issued its Final Decision.[18] The Authority granted exceptions filed by the Department and ruled that Hillsdale College would be required to execute the Assurance of Compliance as a condition of its students' continued receipt of federal financial assistance. The Reviewing Authority found that the College could properly be deemed a "recipient" of "federal financial assistance" under Title IX. The Authority reversed the ALJ on the issue of the validity of the Assurance of Compliance requirement, finding it to be enforceable, insofar as it only required the College to assure compliance with "lawful regulations." [19]

Pursuant to the judicial review provisions contained in 20 U.S.C. § 1683,[20] Hillsdale petitioned directly to the Court of Appeals for the Sixth Circuit for review of the administrative decisions. Before the court, Hillsdale argued that it was not a "recipient" of "federal financial assistance" under Title IX, and thus was not subject to the statute's requirements. The College also contended that the federal loans and grants received by its students could not legally be terminated because of its refusal to execute the Assurance, since enforcement under Title IX is "program specific." The College questioned the Department's efforts to enforce an institution-wide applica-

---

[17] 34 C.F.R. §§ 106.51-106.61 (1982) (Subpart E). (App. at 117-124a.) In *North Haven*, this Court ruled that the employment practices of educational institutions *are* subject to regulation under Title IX. *North Haven*, 456 U.S. at 519-38. Thus, this aspect of the ALJ decision has lost its significance.

[18] App. at 43a.

[19] App. at 52a. *See also Hillsdale College*, 696 F.2d at 423. (App. at 10a.)

[20] App. at 85a.

tion of the statute. In Hillsdale's view, under the statute, "recipients" could only be required to assure compliance as to *particular* programs receiving such assistance; since Hillsdale maintained no such programs, it argued that it was not subject to such an edict. Hillsdale also argued that termination of federal assistance under Title IX could not occur unless there had been a showing of actual discrimination in a particular program receiving federal assistance.[21]

In an opinion dated December 16, 1982, the Court of Appeals for the Sixth Circuit entered its decision in this case, reversing the Reviewing Authority's order.[22] In its decision, however, it "agree[d] with Hillsdale in part and HEW in part."[23] Of paramount importance, the court found Hillsdale to be a "recipient" under Title IX, thereby subject to regulation under the statute.[24] The Court also found that federal financial assistance to Hillsdale's students may be lawfully terminated without a finding that the College is actually discriminating in a particular program receiving aid on the basis of sex. Thus, the net effect of the decision below was to reject the basics of Hillsdale's position and to subject it to regulation and its students to termination of loans and grants unless Hillsdale capitulated in its pursuit of basic principles of independence.

However, the court agreed with Hillsdale's position on the "program-specificity" issue. It found that the Department's policy of enforcement and regulation were invalid, to the extent that it sought to subject Hillsdale's operations to institution-wide control. Thus, the court rejected the Department's position that the entire operation of the College could be considered the relevant "pro-

---

[21] *See* discussion of Hillsdale's position. *Hillsdale College*, 696 F.2d at 421-22. (App. at 6-7a.)

[22] *Id.* at 430. (App. at 26.)

[23] *Id.* (App. at 25a.)

[24] *Id.*

gram" under Title IX. The court concluded that the regulations "as applied . . ., contravene the program-specific nature of Title IX by equating the statutory phrase 'education program and activity' with the education institution itself." [25]

REASONS FOR GRANTING THE WRIT

A. There is a Conflict of Decisions in the Circuits on Important Issues Involved Herein and Currently Pending Before this Court; Consolidation of this Case With the Case of *Grove City College v. Bell* Would Be Appropriate.

On February 22, 1982, a writ of certiorari to the Third Circuit Court of Appeals was granted by the Court in the case of *Grove City College v. Bell*.[26] The decision in *Grove City College* by the Third Circuit conflicts with the decision of the Sixth Circuit in *Hillsdale College*. The central issue in that case is the same as in this case—excessive government regulation of private, independent colleges. For this reason, Hillsdale College respectfully requests that its case be consolidated for review and consideration by the Court with the *Grove City College* case.

The recent decision of the Sixth Circuit in *Hillsdale College* has created a conflict between the Circuits which has been relied upon by Grove City College in its successful petition for writ of certiorari. The consolidation of these cases will allow the Court to fully examine the parameters of the important issues before it, and to resolve the conflict presented. In doing so, the Court should have the benefit of the views of both Hillsdale College and Grove City College.[27]

---

[25] *Id.* at 424. (App. at 12a.)

[26] *See Grove City College, supra* n.1.

[27] It would frustrate Hillsdale's long and expensive efforts since 1975 to establish principles of academic and educational independence if the decision of the Sixth Circuit were allowed to become final pending review by this Court of *Grove City College*.

In both cases, private, independent colleges are seeking to avoid federal control by refusing to accept federal financial assistance. In each case, the colleges refused to execute an Assurance of Compliance, even though there was no allegation of discrimination at issue. Moreover, in each case the only basis for the Department's exercise of regulatory authority was the participation, by certain students attending the colleges, in student assistance programs.[28]

In the *Grove City College* case, the Third Circuit ruled that Grove City may be deemed a "recipient" of federal financial assistance by virtue of the participation by its students in the BEOG financial assistance program. In *Hillsdale College*, the Sixth Circuit also found the College to be a "recipient" because of its students' participation in other federal loan and grant programs. Thus, with respect to the issue of "recipient" status, the Sixth Circuit ruled in accord with the Third Circuit in *Grove City College*, finding that the colleges are properly subject to federal regulation under Title IX by virtue of the students' participation in federal loan and grant programs.[29] Both Circuits so ruled despite the fact that neither Col-

---

[28] The only factual distinction is that in the *Grove City College* case, the BEOG program is the only federal assistance program at issue. The applicability of the GSL program had originally been at issue, but the Department has apparently reversed its position concerning it. *See supra* n.8. In *Hillsdale College*, additional "campus-based" educational assistance programs are involved. Said programs require minimal college administration. *See, e.g.*, discussion of NDSL and SEOG programs, *supra* n.8. However, Hillsdale submits that the legal analysis of the significance of the College's involvement in the student assistance programs, and whether they constitute a "program or activity" under Title IX, remains the same in both factual contexts.

[29] It should be noted that the rationale behind the Sixth Circuit's ruling on the "recipient" issue is not readily decipherable upon review of the Sixth Circuit's opinion. In the court's conclusion, it finds Hillsdale to be a "recipient" and subject to Title IX regulation. However, it reaches this decision without providing any discussion concerning the reasoning or basis for this result.

lege operates any program or activity receiving federal assistance, as required by the statute. Hillsdale submits that such a result is contrary to the plain language of the statute, its legislative history, and reasoned judicial precedent.

In *North Haven Board of Education v. Bell*,[30] this Court held that the Department has jurisdiction under Title IX to consider complaints of employment discrimination in programs or activities receiving federal financial assistance.[31] In doing so, however, the Court rejected the Department's position that its regulatory authority under the statute was institution-wide in scope. The Court stated that Congress had rejected an institutional approach under the statute, in favor of a prohibition of sexual discrimination in particular education programs receiving federal assistance.[32] Specifically, the Court recognized that the coverage and enforcement of Title IX must be "program-specific":

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902.[33]

While the Supreme Court in *North Haven* recognized the "program-specific" nature of Title IX, the definition of what constitutes a program or activity under Title IX remains an open matter. The Court expressly declined to define the initial coverage and jurisdiction of the statute.[34] The *Grove City College* and *Hillsdale College* cases

---

[30] 456 U.S. 512 (1982).

[31] *Id.* at 519-38.

[32] *Id.* at 538.

[33] *Id.* at 534-38.

[34] *Id.* at 529-30. ("[W]e do not undertake to define 'program' [under Title IX] in this opinion.")

present precisely this issue. Hillsdale submits that this issue is ripe for consideration by the Court at this time.

It is in large measure because of the overriding significance, to the entire college and student community in the United States generally, of the issue of what constitutes a "program or activity" under Title IX, that Hillsdale urges the Court to review the decision below. Despite the Sixth Circuit's reversal of the Reviewing Authority's decision in its case, Hillsdale perceives the advances gained in the Sixth Circuit to be less than the necessary clarification of the law. From the outset of administrative proceedings in this case over five years ago, Hillsdale's basic and fundamental contention has been that it is not subject to Title IX and its implementing regulations, however limited or broad in scope they may be construed. Hillsdale College, in order to remain free from federal control and intervention in its affairs, has, as a policy matter, rejected federal financial assistance.[35] Thus, the Sixth Circuit's ruling on the program-specificity issue, while heartening, cannot suffice for the College in its efforts to remain completely independent of federal control.

Another issue of importance has been decided in opposite and conflicting ways by both the Third and Sixth Circuits. In the *Grove City College* case, the Third Circuit held that receipt by students of federal assistance rendered *all* of the operations of the College subject to Title IX enforcement and regulation.[36] The court of appeals therein ruled that the statutory phrase "program or activity" contemplated statutory coverage over the entire educational institution, and that the instituion as a whole may therefore be deemed the relevant "program" under

---

[35] This principle—of private educational institutions being free from federal regulation—is considered by the Trustees of Hillsdale so important that they have authorized the raising of a "Freedom Fund" to be relied upon if necessary to help replace, by student scholarships, any federal help which may be denied its students.

[36] *Grove City College*, 687 F.2d at 696-700.

Title IX. In *Hillsdale College*, although the Department contended it had institution-wide regulatory authority under the statute, the Sixth Circuit ruled to the contrary and found that the regulations were invalid "to the extent that they purport to subject Hillsdale College as an institution to the strictures of Title IX." [37] The conflict between the Circuits creates confusion in the entire academic community and should be clarified by this Court.[38]

With regard to the "program-specificity" issue, the *Hillsdale College* court explicitly recognized that the *Grove City College* case raised the "same issue as that presented here . . . ." [39] However, the Sixth Circuit in *Hillsdale College* took strong exception with, and declined to follow, the Third Circuit's decision that the entire college is the relevant "program" under Title IX.[40] Thus, the decision by the Sixth Circuit on the program-specificity issue is in direct conflict with earlier precedent provided it by the Third Circuit in the case of *Grove City College*. The decision by the Third Circuit in *Grove City College* on the "program-specificity" issue also is in conflict with the decision by the First Circuit in *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir.), *cert. denied*, 456 U.S. 928 (1981).

Hillsdale believes that the decision by the Sixth Circuit on the program-specificity issue represents the reasoned and correct approach to this issue. A grant of Hillsdale's petition and a consolidation of the cases will assist the

---

[37] *Hillsdale College*, 696 F.2d at 424. (App. at 12a.)

[38] In particular, the court decided that the regulations "contravene the program-specific nature of Title IX by equating the statutory phrase 'education program and activity' with the educational institution itself." *Id.* In reaching this decision, the court relied on applicable legislative and judicial precedents and specifically cited the recent decision by this Court in *North Haven*, concerning the program-specific limitation contained in Title IX. *Id.* at 423-25. (App. at 11-13a.)

[39] *Hillsdale College*, 696 F.2d at 429. (App. at 23a.)

[40] *Id.* (App. at 24a.)

Court in examining the issues and will provide the Court with additional record information to dispose of the conflicts. Any decision reached in the *Grove City College* case will necessarily involve the same issues as those in *Hillsdale College*. A decision will impact upon all future actions of Hillsdale College and will affect fundamental interests of that College, as well as many others throughout the United States. Thus, Hillsdale's petition should be granted.

B. This Case Involves Important Issues Concerning the Scope of Governmental Authority to Regulate Private, Independent Colleges Which Decline Federal Assistance; These Issues Require Resolution by the Court.

This case raises issues of critical importance to a sizeable segment of the academic community. At issue is the ability of a private college to operate independently from governmental control and intervention, which the Department asserts as a condition of its continuation of educational assistance to Hillsdale's students. Specifically, at issue is the legality of the Department's efforts to designate Hillsdale College a "recipient" of federal financial assistance, and its concomitant effort to subject all of the activities and programs of the College to federal control. Hillsdale does not argue with the merits of the Title IX legislation; rather, it disputes the authority of the federal government to regulate the activities of a private, independent college which refuses federal assistance, and which is not even alleged to be in violation of the anti-discrimination laws.

The coverage of Title IX is, by its terms, limited to "education program[s] or activit[ies] *receiving* federal financial assistance.[41] However, the Department's definition of "recipient," [42] as embodied in its regulations, is not consistent with this statutory limitation. Instead of "receipt" alone being the touchstone of coverage, as pro-

[41] 20 U.S.C. § 1681.

[42] *See* regulatory definition of "Recipient," *supra* n.6.

vided by statute, the Department asserts that "receives or *benefits*" are the operative words, even though the words "receipt" and "benefit" are not equivalent in meaning.

The regulations, as applied to Hillsdale, are in excess of the statutory authority conferred upon the Department by Congress. Hillsdale enrolls students who "receive Federal financial aid," but Hillsdale does not operate any "education program or activity" which itself receives such assistance. The financial aid at issue here is not financial assistance "to an education program or activity," but assistance *to students* to enable them to attend the college they wish.

There is a broad consensus that independent private educational institutions provide an important diversity and balance to what would otherwise be an exclusively state-run system, and that the preservation of that diversity is in the national interest.[43] Despite this consensus,

---

[43] For example, Joseph Califano, a former Secretary of the Department, stated of private colleges and universities:

> They have been guardians of independent thinking and academic freedom, enjoying a bit more insulation from the whims and pressures of politics than their tax-supported sisters.
>
> Perhaps the greatest contribution of these private institutions, beyond training talent for the nation, has been diversity; the rich variety that colleges like this lend to the American educational landscape. What an incredibly rich resource: Hundreds of institutions, each independent; each solving its problems in its own way; each a vital center of innovation and experiment; each with its own special commitment to cultural and moral values.
>
> It is this diversity that gives American higher education and American life so much of their vitality. It is this diversity that your national government is pledged to nourish and safeguard. 123 Cong. Rec. E3798 (daily ed. June 15, 1977).

See also 117 Cong. Rec. 39249 (1971) (remarks by Rep. Erlenborn); H.R. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2590.

governmental regulation of private university education has grown so pervasive and particular that there is a genuine concern that the diversity represented by such institutions will soon disappear as all universities are increasingly compelled to conform to a pristine federal model or archetype.[44]

The need for a judicial resolution to the important issues raised herein is illustrated by the recent decision in *University of Richmond v. Bell*,[45] and its subsequent evaluation by the Department. In *Richmond*, the district court considered the ability of the Department to investigate discrimination complaints in the University's athletic program. The basis for the assertion of Department regulatory authority was the presence of student assistance programs and a minor library grant at the University.[46] The district court rejected the efforts of the Department to assert such control over the University, holding that the Department had no authority under Title IX to investigate and regulate the athletic program of a private university where said program received no *direct* federal financial assistance.[47] In rejecting the Department's position that the athletic department comes within

---

[44] *See* the satements of Kingman Brewster, then President of Yale University, and of Dallin Oaks, then President of Brigham Young University, in Hearings on *Sex Discrimination Regulations Before the Subcommittee on Post Secondary Education of the House Committee on Education and Labor*, 94th Cong., 1st Sess. at 231-37 (Oaks) and at 234 (Brewster), and the statement of John R. Hubbard, President of the University of Southern California, quoted in Oaks, *A Private University Looks at Government Regulation*, 4 J. of Coll. and U. Law 4, 8 (1976). *See also* G. Roche, *The Balancing Act* (1974). The author, Dr. George C. Roche, III, is the President of Hillsdale College.

[45] 543 F. Supp. 321 (E.D. Va. 1982) (*"Richmond"*).

[46] The programs involved included the NDSL, SEOG, BEOG and College Work-Study Programs. *Id.* at 323.

[47] *Id.* at 328.

its jurisdiction because it "benefits" from funds which are received by the University or other University programs (which, in turn, release University funds to be used in the athletic department), the court relied upon a number of cases which have so ruled.[48] Thus, the district court held that the statute's program-specific requirement must be respected by the Department.

Although this is a district court ruling, the nature of the conflict between that decision and *Grove City College*, as well as its variance from the original position of the Department on the issues involved, warrants review by this Court. Despite a ruling that is in direct conflict with the Department's position in these various proceedings, the government has specifically decided not to appeal the *Richmond* decision to the Fourth Circuit Court of Appeals. This decision to forego an appeal is based on its stated opinion that the decision in *Richmond* was "analytically and legally sound," even when expressly considered with reference to the Third Circuit decision in *Grove City College*.[49] This reaction by the Department is significant indeed, considering the history of this proceeding, and its consistent prior position to the contrary.

It appears that the Department has now taken the position that although Hillsdale and Grove City Colleges are "recipients," and subject to the Assurance of Compliance requirement, the statute and its regulations must be interpreted in a "program-specific" manner.[50] In light of the conclusive decision by the Court on the "program-specificity" issue in *North Haven*, the Department may legitimately have chosen to change its position. However, it is not accurate for the Department to argue that "the *Hillsdale* court misapprehended the Department's

---

[48] *Id.*

[49] *See* Letter of Assistant Attorney General Reynolds to Clarence Pendleton, Jr. (September 16, 1982). (App. at 132-33a.)

[50] *See* Brief for the United States in Opposition to Grove City College's Petition for Writ of Certiorari, filed January 21, 1983.

position"[51] on this matter. The Department has consistently argued, and did assert in the court below, that its authority to regulate Hillsdale is institution-wide in scope.[52] Thus, the apparent shift in administrative policy further illustrates the need for a definitive and lasting judicial resolution of this controversy by this Court. An administrative solution to the issues presented simply will not suffice, as future administrations and changing political considerations may reverse any victory obtained by the College.[53]

CONCLUSION

Throughout the many years of this proceeding, Hillsdale College's actions have been motivated by its principled objection to the excessive intrusion by the government into its private academic affairs. The College believes that the conflicting cases of *Grove City College* and *Hillsdale College* should be considered by this Court at

---

[51] *Id.* at 7 n.7.

[52] For example, the Department argued in its brief before the Sixth Circuit that the termination order was

> 'program specific' because Hillsdale itself is the relevant 'program or activity.' The financial assistance provided to the college through the student aid programs is not directed to or limited to any particular education 'program or activity' at the college and the entire college benefits from the assistance provided.

Brief of the Department of Education, Sixth Circuit Court of Appeals, filed Nov. 25, 1980, at 12.

[53] In Hillsdale's opinion, the need for a final judicial resolution may have been presaged by this Court's statement in *North Haven*, 456 U.S. at 538-39:

> In construing regulations, the Court normally defers to the agency's interpretation. . . . Here, however, that interpretation has fluctuated from case to case, and even as this case has progressed. . . . Accordingly, *there is no consistent administrative interpretation of the Title IX regulations for us to evaluate.* (Citations omitted, emphasis added.)

the same time. To provide judicial finality, the Court should review Hillsdale's case and provide all parties with direction and a final resolution to these controversies.

WHEREFORE, for the reasons set forth herein, petitioner respectfully prays that a writ of certiorari issue to review the decision of the court of appeals.

Respectfully submitted,

ROBERT W. BARKER
Counsel of Record
GORDON C. COFFMAN
LUISA L. LANCETTI
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141
Attorneys for Petitioner

March 16, 1983